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VALLEY HEALTH SYSTEM LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

VALLEY HEALTH SYSTEM LLC,	)	Case No. 2:10-cv-000949-LRH-LRL
)	
Plaintiff,	)	NOTICE OF MOTION AND
	)	MOTION TO STRIKE
v.	)	DEFENDANT TOTAL
	)	ELECTRICAL SERVICES &
TOTAL ELECTRICAL SERVICES & SUPPLY	)	SUPPLY CO. D/B/A TESSCO'S
CO. D/B/A TESSCO; CAPROCK	)	AFFIRMATIVE DEFENSES;
HEALTHPLANS, INC.; and DOES 1 through 10,	)	POINTS AND AUTHORITIES IN
inclusive,	)	SUPPORT THEREOF
)	
Defendants.	)	[proposed] order lodged
)	

TO THIS HONORABLE COURT, TO ALL PARTIES AND THEIR COUNSEL OF
RECORD:

PLEASE TAKE NOTICE that plaintiff Valley Health System LLC will move, and does hereby move, this Honorable Court for an order striking certain of defendant's affirmative defenses. This motion arises under Federal Rules of Civil Procedure ("FRCP") 8 and 12(f), allowing this Court to strike from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. This motion is also arises out of the precedent established under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and related precedent and authority.

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1 This motion is based on this notice, the attached memorandum of points and authorities,
2 the Court files and records of this action, and on such oral argument and testimony as may be
3 heard by the Court at the time of the hearing of this motion.

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5 Dated: July 16, 2010

GORDON & REES, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff Valley Health System LLC is the owner and operator of a licensed hospital commonly known as Valley Hospital Medical Center (“Hospital”) located in Las Vegas, Nevada and has brought this suit under Nevada law in an attempt to collect monies owed pursuant to health care services provided to patient Kathy Shirley. Defendant Total Electrical Services & Supply Co. (“TESSCO”) is or was Ms. Shirley’s self-funded employer, and defendant Caprock Healthplans, Inc. (“Caprock”) was the third-party administrator of the “PPO Agreement” described below. This case was originally filed in Clark County District Court but was removed pursuant to this Court’s diversity subject matter jurisdiction.

Plaintiff seeks damages arising out of defendants’ wrongful denial and refusal to pay for medically necessary health care services due under a PPO Hospital Participation Agreement (“2001 Agreement”), entered into on September 1, 2001, between plaintiff and Beech Street Corporation (“Beech Street”), acting on behalf of TESSCO as the intended third party beneficiary. The 2001 Agreement was later amended, in part, on November 1, 2007. (The 2001 Agreement, as amended, shall hereinafter be referred to as the “PPO Agreement.”)

The basic terms of the 2001 Agreement are:

a) The Hospital agreed to participate in a network of healthcare providers (the “Network”) to provide hospital services pursuant to the terms of the 2001 Agreement and at the agreed upon rates of payment;

b) Beech Street, on behalf of TESSCO, agreed to pay or arrange to pay the Hospital for services provided by the Hospital.

The amendments made to the 2001 Agreement, and memorialized in the PPO Agreement, include, but are not limited to, the following:

a) The “Alternates Rates,” as set forth in Ex. B-1, beginning in November 1, 2007 and continuing for twenty-four (24) months, would be amended;

b) Specifically, as set forth in paragraph I of the PPO Agreement, “When HOSPITAL’s billed charges for a single uninterrupted stay exceeds the threshold listed below,

1 then HOSPITAL shall be reimbursed at a percentage of billed charges listed below, in lieu of the
 2 contracted PER DIEMS, case rates, and exclusions/carve-outs listed in this Exhibit;”

3 c) The “Stop Loss Threshold” would be \$116,640/threshold and the
 4 “Reimbursement Percentage” would be 60% of billed charges.

5 d) Beech Street agrees “prior-authorized or concurrently reviewed services will not
 6 be subject to retrospective review.”

7 On January 9, 2009, the patient was admitted to the Hospital for medical care and
 8 treatment until her discharge on January 24, 2008 (the “Hospital Stay”). Full knowledge,
 9 consent and authorization for medical services and treatment was given for the patient during the
 10 Hospital Stay in the amount of approximately \$341,706.00. Plaintiff sought to recover
 11 \$205,023.60, or 60%, of the patient’s medical expenses, pursuant to the stop loss reimbursement
 12 percentage set forth in the PPO Agreement, and submitted invoices to defendants for prompt
 13 payment. Caprock paid plaintiff a portion of the bill in the amount of \$113,120.60, resulting in a
 14 balance of \$91,903.00 still owing. Plaintiff made repeated requests for payment of the
 15 \$91,903.00 balance, but defendants have continued to deny payment without cause, claiming
 16 certain charges were unbundled, duplicative, not sufficiently documented, or involved overstated
 17 utilization for items charged.

18 On June 28, 2010, TESSCO served its answer and asserted twenty-eight¹ separate and
 19 distinct affirmative defenses. The vast majority of the asserted affirmative defenses are either (a)
 20 insufficiently plead or (b) not recognizable as a matter of law.

21 **II. APPLICABLE LAW**

22 The procedure for properly raising and pleading an affirmative defense is governed by
 23 the Federal Rules of Civil Procedure (“FRCP”). If an affirmative defense is not properly raised,
 24 FRCP 12(f) permits a court to strike any insufficient defense or any redundant, immaterial,
 25 impertinent, or scandalous matter from a pleading. The purpose of a Rule 12(f) motion is to
 26 avoid spending time and money litigating spurious issues. *See Fantasy, Inc. v. Fogerty*, 984 F.2d
 27 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994), citing *Sidney-Vinstein*

28 ¹ TESSCO mistakenly asserts two “Fifteenth Affirmative Defenses.”

1 *v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A defense is insufficiently plead if it fails
 2 to give the plaintiff fair notice of the nature of the defense. *See Wyshak v. City Nat'l Bank*, 607
 3 F.2d 824, 827 (9th Cir. 1979). A matter is immaterial if it has no essential or important
 4 relationship to the claim for relief pleaded. *See Fogerty*, 984 F.2d at 1527. A matter is
 5 impertinent if it does not pertain to, and is not necessary to, the issue in question in the case. *Id.*

6 Further, whether an affirmative defense is valid as a matter of law is decided based on
 7 substantive state law because federal courts exercising diversity jurisdiction apply the
 8 substantive law of the state in which they are located to determine the applicability of affirmative
 9 defenses. *See Erie RR. Co. v. Tompkins*, 304 U.S. 64 (1938); *Snead v. Metro. Prop. & Cas. Ins.*
 10 *Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001), *cert. denied*, 534 U.S. 888 (2001).

11 **A. Many Of TESSCO's Affirmative Defenses Must Be Stricken Pursuant To**
 12 **The Procedural Standards Set Forth In *Bell Atl. Corp. v. Twombly* and**
 13 ***Ashcroft v. Iqbal*.**

14 Many courts have stated that affirmative defenses are subject to a heightened pleading
 15 standard. In a 2007 anti-trust matter, the Supreme Court established a heightened standard for
 16 pleading by abrogating the bare notice pleading standard allowed under FRCP 8(a) and requiring
 17 responding parties to plead factual allegations sufficient to "raise a right to relief above the
 18 speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Merely pleading the
 19 bare elements of a cause of action without factual enhancement is no longer sufficient to state a
 20 claim pursuant to FRCP 8. *Id.* at 546, 557.

21 In 2009, the Supreme Court, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), clarified that
 22 the *Twombly* interpretation of FRCP 8 is not limited to anti-trust matters, but is applicable to all
 23 federal civil actions. *Id.* at 1953. The Court established a two-part analysis for federal courts to
 24 consider when determining whether pleadings meet this heightened standard. First, the deciding
 25 court should identify any conclusory pleading and, if found, should hold the pleading is not
 26 entitled to a presumption of truth unless it is supported by well-pled factual allegations. *Id.* at
 27 1949. Second, the court should determine whether the properly supported allegations are
 28 sufficient to render the pleader's claim "plausible," not just "possible." *Id.* "A claim has facial

1 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
2 inference that the defendant is liable for the misconduct alleged.” *Id.*

3 Since *Iqbal*, courts have extended the heightened pleading standard and analysis to the
4 pleading of affirmative defenses as well as claims, such that an affirmative defense without any
5 factual support is deemed insufficient under FRCP 8(c). See *Hayne v. Green Ford Sales Inc.*,
6 263 F.R.D. 647, 650 (D.Kan. 2009) (“It makes no sense to find that a heightened pleading
7 standard applies to claims but not affirmative defenses.”); see also, *CTF Dev., Inc. v. Penta*
8 *Hospitality, LLC*, 2009 WL 3517617, at *8 (N.D. Cal. Oct. 26, 2009) (Alsup, J.) (“Under the
9 *Iqbal* standard, the burden is on the defendant to proffer sufficient facts and law to support an
10 affirmative defense.”) (attached hereto as Exhibit 1); *Barnes v. AT&T Pension Benefit Plan*, No.
11 2010 WL 2507769 (N.D. Cal. June 22, 2010) (applying *Twombly* and *Iqbal* to affirmative
12 defenses) (attached hereto as Exhibit 2). For example, in *Hayne*, the court found a statute of
13 limitations defense, among others, was insufficient because it made no reference to dates or time
14 period. *Hayne*, 263 F.R.D. at 651. Similarly, the court held a defense for comparative
15 negligence of others was insufficient because it did not indicate who the other individuals might
16 be. *Id.* The court also found a reference to a failure to mitigate damages by plaintiff was
17 insufficient because it did not suggest what plaintiff failed to do. *Id.*

18 Many of TESSCO’s affirmative defenses are insufficiently plead under Rule 8 and
19 pursuant to the rules set forth above because they present conclusory statements, unsupported by
20 well-pled factual allegations. For example, TESSCO’s First Affirmative Defense states, “The
21 Complaint and each purported claim for relief therein fails to state facts sufficient to constitute a
22 cause of action, or any action, against Defendant.” (Def. Ans. 5.) As with the failure to mitigate
23 damages defense alleged in *Hayne*, this defense is insufficiently plead because it fails to suggest
24 how the claims for relief fail to state sufficient facts. Further, TESSCO’s Second Affirmative
25 Defense states, “If Plaintiff[s] sustained damages as a result of the incidents as alleged, such
26 damages, if any, were caused and contributed to by the conduct of Plaintiff, and such constitutes
27 a bar to any recovery or, in the alternative, any recovery obtained by Plaintiff should be reduced
28 to the extent such negligence or other wrongful conduct was a cause of the claimed damages.”

(*Id.*) This defense is insufficiently plead because it fails to allege facts indicating what plaintiff has done to cause or contribute to the damages sustained.

In the interest of brevity, the following additional affirmative defenses asserted by TESSCO are insufficiently plead:

- Third Affirmative Defense: “. . . Defendant is entitled to comparative contribution from all other persons, parties and/or organizations who are responsible for Plaintiff’s damages, if any.” (*Id.*) Defendant has not stated sufficient facts, such as who the other persons, parties or organizations may be.
- Fourth Affirmative Defense: “. . . if Defendant were found to be legally responsible, then it provisionally alleges that its legal responsibility is not the sole cause of the damages, if any. . . .” (*Id.*) Defendant has not provided support for why it is not legally responsible or what the other causes of damages may be.
- Fifth Affirmative Defense: Plaintiff’s “damages, if any, were caused and contributed to by the wrongful conduct of those persons whose conduct on their part is imputed to Plaintiff and constitutes a bar to any recovery by said Plaintiff. . . .” (*Id.* at 5–6.) Defendant has not identified any persons who may have engaged in wrongful conduct.
- Sixth Affirmative Defense: “Plaintiff’s Complaint and each purported claim for relief of the Complaint therein appears to be barred by the applicable statutes of limitations.” (*Id.* at 6.) Defendant has failed to provide facts to support this conclusion, such as relevant dates or times.
- Seventh Affirmative Defense: “Plaintiff’s Complaint and each purported claim for relief of the Complaint therein appears to be barred by the applicable statutes of repose.” (*Id.*) As above, Defendant has failed to provide facts to support this conclusion, such as relevant dates or times.
- Eighth Affirmative Defense: “Plaintiff’s Complaint and each purported claim for relief of the Complaint therein appears to be barred by the applicable statutes of frauds.” (*Id.*) Defendant has not stated facts to support this defense.

- 1 ▪ Tenth Affirmative Defense: “Plaintiff failed to bring this action within a reasonable
2 amount of time, all to the prejudice of Defendant and as such, Plaintiff is estopped by
3 the doctrine of laches from now bringing these claims.” (*Id.*) Defendant has failed
4 to provide facts to support this allegation, such as relevant dates or times, or how
5 Defendant was prejudiced.
- 6 ▪ Thirteenth Affirmative Defense: “Plaintiff’s claims are barred and/or diminished as a
7 result of failure of Plaintiff to exercise reasonable care in mitigating its damages.” (*Id.*
8 at 7.) Defendant has failed to suggest what Plaintiff failed to do to mitigate its
9 damages.
- 10 ▪ Sixteenth Affirmative Defense: “Plaintiff’s Complaint and each purported claim for
11 relief of the Complaint therein appears to be barred by the doctrine of waiver.” (*Id.*)
12 Defendant has failed to allege facts to suggest waiver by Plaintiff.
- 13 ▪ Seventeenth Affirmative Defense: “Plaintiff’s Complaint and each purported claim for
14 relief of the Complaint therein appears to be barred by the doctrine of res judicata.”
15 (*Id.* at 7–8.) Defendant has not plead facts to explain why the Complaint and claims
16 therein are barred by this doctrine.
- 17 ▪ Twenty-Third Affirmative Defense: “Plaintiff’s Complaint fails to name an
18 indispensable party, that is, one needed for just adjudication.” (*Id.* at 8.) Defendant
19 fails to identify or provide facts suggesting who the indispensable party may be.
- 20 ▪ Twenty-Fourth Affirmative Defense: “Plaintiff’s Complaint is preempted by ERISA
21 and all provisions therein.” (*Id.*) Defendant fails to identify facts suggesting how the
22 Complaint is preempted by ERISA and, in fact, controlling authority expressly
23 provides that instant claims are *not* preempted by ERISA. To the extent TESSCO
24 attempts to re-plead this defense, it would raise serious Rule 11 inquiry. *See, e.g.,*
25 *Windisch, M.D. v. Hometown Health Plan, Inc.*, 2010 WL 786518 (D. Nev. Mar. 5,
26 2010) (attached hereto as Exhibit 3).

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1 Accordingly, FRCP 12(f) permits this Court to strike the above-listed affirmative
 2 defenses, pursuant to the law established by the Supreme Court in *Twombly*, *Iqbal*, and the
 3 subsequent interpretations and applications of said law.

4 **B. Many of Defendant’s Affirmative Defenses Should Be Stricken As A Matter**
 5 **Of Law.**

6 “Affirmative defenses that are insufficient as a matter of law should be stricken.” *D.E.*
 7 *Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F.Supp.2d 1262, 1271 (D. Nev. 2008),
 8 citing *Donovan v. Schmoutey*, 592 F.Supp. 1361, 1402 (D.Nev. 1984). To prevail on a motion to
 9 strike an “insufficient defense,” a plaintiff must show there is no issue of fact, nor any substantial
 10 question of law, that might allow the defense to succeed. *See E.E.O.C. v. Bay Ridge Toyota,*
 11 *Inc.*, 327 F.Supp.2d 167, 170 (E.D.N.Y. 2004); *RDF Media Ltd. v. Fox Broadcasting Co.*, 372
 12 F.Supp.2d 556, 561 (C.D.Cal. 2005). For example, in *D.E. Shaw Laminar Portfolios*, the court
 13 held defendant’s equitable estoppel defense was properly stricken because defendant did not
 14 allege each element of equitable estoppel, rendering the defense legally insufficient. 570
 15 F.Supp.2d at 1271–72. In *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*
 16 677 F.2d 1045 (5th Cir. 1982), the court held that if an affirmative defense asserted under federal
 17 antitrust law was invalid as a matter of law, a motion to strike should be granted. *Id.* at 1057–58.
 18 *See also Federal Deposit Ins. Corp. v. Butcher*, 660 F.Supp. 1274, 1283 (E.D. Tenn. 1987)
 19 (finding the defenses of laches, waiver, and running of the statutes of limitations insufficient as a
 20 matter of law because the suit was filed well within the statute of limitations and as soon as
 21 practicable after obtaining that right).

22 Here, the following affirmative defenses are insufficient as a matter of law and should be
 23 stricken without leave to amend because each defense fails to allege an issue of fact that might
 24 allow the defense to succeed and/or fails to allege a substantial question of law that might allow
 25 the defense to succeed.

26 **FIRST AFFIRMATIVE DEFENSE**

27 *The Complaint and each purported claim for relief therein fails to state facts*
 28 *sufficient to constitute a cause of action, or any action, against Defendant.*

1 The defense that a complaint fails to state facts sufficient to constitute a cause of action is
 2 not a proper affirmative defense. The proper vehicle for this defense is a motion to dismiss,
 3 pursuant to FRCP 12(b)(6). *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 732 (9th
 4 Cir. 1987), citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

5 **NINTH AFFIRMATIVE DEFENSE**

6 *Plaintiff's conduct relative to Defendant and the relationship between Plaintiff*
 7 *and Defendant were such as to bring Defendant into this lawsuit with unclean*
hands, and as such, Plaintiff is estopped from pursuing these claims.

8 The defense that plaintiff is estopped from pursuing its claims due to unclean hands is not
 9 a proper affirmative defense. To prove the unclean hands doctrine, the Court must consider (1)
 10 the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the
 11 misconduct. *Las Vegas Fetish and Fantasy v. Ahern Rental*, 182 P.3d 764, 767 (Nev. 2008). In
 12 the absence of egregious misconduct, as here, this defense fails.

13 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

14 *The Cause of Plaintiff's damages, if any, were open, obvious and known to said*
 15 *Plaintiff under the facts and circumstances relevant hereto, and said Plaintiff*
 16 *voluntarily assumed all risks and dangers thereon, thereby barring said*
Plaintiff's claim for recovery.

17 The defense of assumption of the risk is improper. To the extent defendant relies upon a
 18 theory of primary implied assumption of risk, this doctrine was abolished by the court's
 19 comparative negligence statute. *Turner v. Mandalay Sports Entertainment*, 180 P.3d 1172, 1177
 20 (Nev. 2008). To the extent defendant relies upon a theory of secondary implied assumption of
 21 risk, this doctrine only applies when a plaintiff knowingly encounters a risk created by the
 22 defendant's negligence. *Id.* at 1177 n.22. Here, no allegations of defendant's negligence have
 23 been asserted. Finally, no claims that plaintiff expressly assumed risk, either through contract or
 24 other means, have been alleged by either party. *Id.* at 1177.

25 Therefore, plaintiff requests this court strike the above-listed affirmative defenses
 26 due to insufficiency as a matter of law.

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1 IV.

2 CONCLUSION

3 Accordingly, plaintiff respectfully requests this court strike the above-listed affirmative
4 defenses because they are insufficiently plead and are not recognizable as a matter of law.
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6 Dated: July 16, 2010

GORDON & REES LLP

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